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In The

Supreme Court of the United States

PAMELA CLARKE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 841(a)(1) makes it "unlawful for any person knowingly or intentionally – to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance[.]" 21 U.S.C. § 841(a)(1). A defendant convicted under this section is subjected to a mandatory five-year prison sentence if the crime involved "50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers." 21 U.S.C. § 841(b)(1)(B)(viii). Clarke stands convicted under 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(viii) because of three samples of biphase liquid with a combined weight of 62.46 grams. The circuits, however, are in disagreement on the question of whether or not the entire amount of the mixture should be counted for purposes of subjecting a defendant to the mandatory minimum sentence because the liquid was not in a consumable or usable state.

I. Whether biphase liquid containing methamphetamine, that is not capable of being ingested or consumed in its current state, constitutes a mixture of a substance containing methamphetamine within the meaning of 21 U.S.C. § 841(b)(1)(B)(viii) and whether a negative answer to said question is otherwise compelled by this Court's interpretation of an analogous provision in *Chapman v. United States*, 500 U.S. 453 (1991).

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OPINION BELOW

The Eighth Circuit Court of Appeals released its opinion for publication in the Federal Reporter. The decision entitled *United States v. Pamela Clarke* is reported at 564 F.3d 949 (8th Cir. 2009). The district court did not publish an opinion in this case.

JURISDICTION

The Eighth Circuit filed its decision on May 8, 2009 and entered an order denying petitioner's Motion for Rehearing and Rehearing En Banc on July 16, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISION INVOLVED

21 U.S.C. § 841(b)(1)(B)(viii)

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows: In the case of a violation of subsection (a) of this section involving –

> 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its

> isomers; such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years. . . .

STATEMENT OF THE CASE

A federal grand jury indicted Clarke on five counts, including: (1) conspiracy to possess pseudoephedrine knowing it would be used to manufacture methamphetamine, in violation of 21 U.S.C. §§ 841(c) and 846; (2) possession of pseudoephedrine knowing it would be used to manufacture methamphetamine, in violation of 21 U.S.C. § 841(c); (3) conspiracy to manufacture fifty or more grams of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. §§ 841(a), 841(b)(1)(B)(viii), and 846; (4) possession with intent to distribute fifty or more grams of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(viii) and 18 U.S.C. § 2; and (5) maintaining a drug involved premises, in violation of 21 U.S.C. § 856(a)(2). The district court had jurisdiction pursuant to 18 U.S.C. § 3231 because the case involved offenses against the laws of the United States.

On September 7, 2006, Officer Timothy Groate went to a residence in Dittmer, Missouri, after receiving information indicating that methamphetamine production was taking place at that location. Groate, along with several other officers, knocked on the door and announced their presence. According to Groate, Clarke opened the door and gave permission to search

the residence. Groate then searched the residence and located items associated with methamphetamine manufacture, as well as an amphetamine pill, cocaine base and methamphetamine residue.

In a shed located on the property, Officer Groate located a mason jar containing "biphase liquid." Three samples were taken from the liquid to be tested for the presence of methamphetamine. Officer Groate testified that the liquid was flammable and explosive in the state in which it was found.

At trial, Clarke stipulated that the samples taken from the jar constituted a total weight of 62.46 grams and that each sample contained the presence of methamphetamine. At the close of the Government's evidence, Clarke moved for a judgment of acquittal. The district court denied the motion, stating there was sufficient evidence to submit all five counts to the jury. At the close of Clarke's case, she renewed her motion for judgment of acquittal. The district court again denied the motion. The jury acquitted Clarke on Count one of the Indictment, but found Clarke guilty on Counts two, three, four and five.

After trial, a Pre-Sentence Report ("PSR") was prepared, which calculated an advisory Guidelines range of 63 to 78 months imprisonment for Clarke. The PSR used the 62.46 grams of biphase liquid containing methamphetamine to calculate an offense level of 26 for Clarke. Counsel objected to using the full amount of the biphase liquid based on the fact

that it included unusable liquid product in the final drug quantity. Because the biphase liquid was unusable, counsel argued that it should not be counted as a "mixture or substance" under 21 U.S.C. § 841(b) or U.S.S.G. § 2D1.1. The district court overruled Clarke's objection. Based on the drug quantity attributable to her, Clarke was subjected to the five-year mandatory minimum sentence under 21 U.S.C. § 841(b). The district court sentenced Clarke to 63 months.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER THE PHRASE "MIXTURE OR SUBSTANCE" AS USED IN THE FEDERAL DRUG STATUTES ONLY APPLIES TO SUBSTANCES READILY CAPABLE OF BEING INGESTED OR CONSUMED.

This Court should exercise its discretion and review petitioner's writ because the circuit courts of appeals are currently split on the critical question of what constitutes a "mixture or substance" within the meaning of the federal drug statutes. The split has arisen due to differing views over the proper application of this Court's interpretation of the same provision in its 1991 decision in *Chapman v. United States* with respect to the drug LSD. The majority of the circuits have adopted what is termed as a "market-oriented" approach. Pursuant to that approach,

unusable amounts of the mixture of a substance are not counted for purposes of sentencing or the application of the statutory mandatory minimums. These courts have relied on the Supreme Court's rationale in *Chapman* where the Court noted that Congress adopted a market-oriented approach to punishment because its primary concern was on the amount of the prohibited drug reaching the streets.

Other circuits, however, have rejected the "market-oriented" approach relying on a strict, plain language interpretation of what constitutes a mixture of a substance. These circuits have likewise relied on the rationale in *Chapman* where the Court adopted a dictionary definition approach to the meaning of a "mixture." However, these circuits have failed to recognize that adopting such an approach can lead to absurd results, which is not consistent with Congress's intent as interpreted by the Court in *Chapman*.

Further exacerbating the circuit split is that of the circuits which have adopted the "market-oriented" approach, two circuits have refused to apply that rationale with respect to methamphetamine. These circuits have also relied on the Court's rationale in *Chapman* where the Court apparently singled out the drugs methamphetamine and PCP from its market-oriented approach because the sentencing statute and advisory Guidelines also punished more pure forms of the drug in addition to mixtures.

The resulting circuit split has caused much confusion over the proper application of the sentencing

statutes and advisory Guidelines to mixtures of a substance. As a result, criminal defendants are receiving widely divergent sentences based simply on where they were convicted. As such, this Court should exercise its supervisory powers and resolve the circuit conflict to promote greater uniformity in the sentencing of similarly situated defendants.

A. The Supreme Court's interpretation of "mixture or substance" in *Chapman v. United States*, which led to the current circuit split.

Neither the statute nor the advisory Guidelines defines the phrase "mixture or substance" as it is used in 21 U.S.C. § 841. The Supreme Court, however, had occasion to interpret this phrase with respect to the drug LSD in *Chapman v. United States*, 500 U.S. 453 (1991). In *Chapman*, the Court addressed the issue of whether blotter paper was a "mixture or substance containing a detectable amount of" LSD under Section 841(b) and whether the weight of such paper, as opposed to the net weight of the drug, should be included for determining the appropriate sentence.

The Court concluded that the blotter paper, which was typically used as a carrier medium for LSD, was a "mixture or substance" within the meaning of the statute. *Chapman*, 500 U.S. at 461. The Court adopted an ordinary meaning approach and relied on a dictionary definition for such terms. *Id.* at

462. In doing so, the Court noted that LSD is typically applied to blotter paper in a solvent. *Id.* After the solvent is absorbed into the paper and evaporates, the LSD mixes with the paper in a manner that "cannot easily be distinguished from the [ ] paper, nor easily separated from it." *Id.* The Court also compared the blotter paper used with LSD to the use of cutting agents mixed with heroin and cocaine. *Id.* The Court noted that the blotter paper carrying the LSD is often ingested, similar to the cutting agents used with other drugs. *Id.* In contrast, however, the Court noted that interpreting the phrase to include carrier mediums such as a glass vial or an automobile would be absurd. *Id.* at 462-463. The Court reasoned that the drug is easily distinguished and separated from such carrier mediums, and as such these mediums are not as clearly "mixed or otherwise combined with the drug." *Id.* at 463. Because such carriers are similar or akin to packaging materials, the Court concluded they should not be included in determining the appropriate sentence for drug distribution. *Id.*

The Court's reasoning was also based on the structure of the statute and the rationale underlying Congress's sentencing scheme. The Court noted that the mandatory minimum sentence for LSD was based on the weights of a "mixture or substance containing a detectable amount" of the drug. *Chapman*, 500 U.S. at 459. The Court, however, pointed out that the statutory sentencing scheme for other drugs, such as PCP and methamphetamine, were based on either

the weight of a "mixture or substance" or on lower weights of pure forms of the drugs. *Id.* Because Congress knew how to distinguish between the pure drug and a "mixture or substance," Congress made it clear that it intended to include "the dilutant, cutting agent, or carrier medium" in the weight of the drug for sentencing purposes. *Id.* at 459-460.

As to the rationale underlying Congress's sentencing scheme, the Court stated that "Congress adopted a 'market-oriented' approach to punishing drug trafficking." *Chapman*, 500 U.S. at 461. Under such an approach, the length of an offender's sentence was determined by the "total quantity of what is distributed, rather than the amount of pure drug involved[.]" *Id.* In keeping with this principle, Congress set mandatory minimum sentences based on the total weight of a "mixture or substance" containing a detectable amount of the controlled substance. The Court further commented on Congress's rationale as follows:

> It intended the penalties for drug trafficking to be graduated according to the weight of the drugs in whatever form they were found – cut or uncut, pure or impure, ready for wholesale or ready for distribution at the retail level. Congress did not want to punish retail traffickers less severely, even though they deal smaller quantities of the pure drug, because such traffickers keep the street markets going.

Id. Because Congress was concerned with the "'street weight' of the drugs" being sold "rather than [ ] the net weight of the active component, it was rational to sentence an offender based on the total quantity of the 'mixture or substance' containing a detectable amount of the drug." *Id.* at 465.

B. The breakdown of the circuits with respect to the market-oriented approach after *Chapman*.

The reference to the "market-oriented" approach in *Chapman* has sparked differing views about how to calculate drug quantity under Section 841(b) and the advisory Guidelines. Those circuits adopting the "market-oriented" approach in defining "mixture or substance" only include the consumable or ingestible portion in the drug quantity for sentencing purposes. These courts include the Second, Third, Sixth, Seventh and Eleventh Circuits. *See, e.g., United States v. Acosta*, 963 F.2d 551, 554-556 (2nd Cir. 1992) (concluding that creme liqueur mixed with cocaine should not be counted as part of a "mixture or substance" because cocaine could not be ingested until it was distilled from creme liqueur); *United States v. Rodriguez*, 975 F.2d 999, 1005-06 (3rd Cir. 1992) (holding that boric acid mixed with cocaine would not be counted in that it was more equivalent to packaging material from which the cocaine would have to be removed for use because the mixture was unusable and perhaps even toxic); *United States v. Jennings*, 945 F.2d 129, 137 (6th Cir. 1991) (holding

that it would be inappropriate to include entire weight of contents of Crockpot containing a detectable amount of methamphetamine, especially if it contained poisonous chemicals or byproducts, because it could not have been distributed to consumers); *United States v. Johnson*, 999 F.2d 1192, 1196 (7th Cir. 1993) (holding that waste water mixed with cocaine was not "mixture or substance" because it was a mere by-product which was not ingestible); *United States v. Rolande-Gabriel*, 938 F.2d 1231, 1237-38 (11th Cir. 1991) (holding that liquid containing cocaine would not be counted for sentencing purposes because it was waste material and therefore was unusable).

To illustrate the rationale of those circuits adopting the market oriented approach, the Seventh Circuit addressed the meaning of a "mixture or substance" within the context of methamphetamine in *United States v. Stewart*, 361 F.3d 373 (7th Cir. 2004). In *Stewart*, the defendant pled guilty to one count of conspiring to manufacture, distribute, and possess with intent to manufacture and distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. *Id.* at 373. On appeal, the defendant argued that the district court erred in subjecting him to the ten-year mandatory minimum under 21 U.S.C. § 841(b)(1)(A)(viii), by including 825 grams of a solution generated during an attempt to produce methamphetamine, which was not usable or consumable. *Id.* Instead, the defendant argued that only the 2.4 grams of actual methamphetamine should have been counted. *Id.* at 373-374.

The Seventh Circuit agreed with the defendant and held that "only usable or consumable mixtures or substances can be used in determining drug quantity under § 841(b)." *Stewart*, 361 F.3d at 382. The court first noted that the crux of *Chapman's* market-oriented analysis was the total quantity of what is distributed on the streets, as opposed to the amount of the pure drug involved. *Id.* at 377. However, the court noted that absurd or irrational consequences contrary to Congress's intent would result if the statute or *Chapman* were read to include "the weight of all mixtures whether usable, ingestible or marketable[.]" *Id.* at 378. The court reasoned that a person who possesses a solution at an early stage of the manufacturing process or waste product at the end is not attempting to increase the amount of the salable drug, which was the overriding concern in *Chapman*. *Id.* Because a partially processed solution would tell one how much of a drug can be produced and the waste would tell one how much was produced, it stood to reason that only the amount of usable or consumable substances should be counted. *Id.*

The court also relied in part on an amendment to the advisory Guidelines. The court noted that in 1993, the Sentencing Commission passed Amendment 484 in response to the inter-circuit conflict arising after *Chapman*. *See Stewart*, 361 F.3d at 378. The amendment stated that "sentencing courts should exclude 'materials that must be separated from the controlled substance before the controlled substance

can be used.'" *Id.* Although the statute and *Chapman* are controlling, the Seventh Circuit adopted a construction which harmonized the statute, *Chapman* and the Guidelines over one that did not.

The First, Tenth and Eighth Circuits, on the other hand, have relied on a strict plain language approach to Section 841(b). As such, these courts have included all parts of any solid or liquid containing a detectable amount of the drug for purposes of sentencing, even if it is not ingestible or consumable. *See, e.g., United States v. Mahecha-Onofre*, 936 F.2d 623, 626 (1st Cir. 1991) (holding that a chemically-bonded cocaine/acrylic suitcase was properly counted as a "mixture or substance" within meaning of statute, even though the suitcase material could not be consumed); *United States v. Richards*, 87 F.3d 1152 (10th Cir. 1996) (rejecting market approach and holding that liquid byproduct containing methamphetamine constituted "mixture or substance" within plain meaning of term); *United States v. Kuenstler*, 325 F.3d 1015 (8th Cir. 2003).

For example, the Eighth Circuit had occasion to interpret the phrase "mixture or substance" in relation to methamphetamine in *United States v. Kuenstler*, 325 F.3d 1015 (8th Cir. 2003).[1] In *Kuenstler*, the

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[1] The other Eighth Circuit panels to have considered the issue, *United States v. Gentry*, 555 F.3d 659 (8th Cir. 2009) and *United States v. Pamela Clarke*, No. 08-2778 (8th Cir. May 8, 2009), also sided with *Kuenstler*, but were required to do so because a panel cannot overrule a prior decision of another

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defendants were convicted of charges related to manufacturing methamphetamine in excess of fifty grams. *Id.* at 1018. Law enforcement authorities uncovered a lab which contained equipment and precursor chemicals, as well as substances containing methamphetamine in the attic of a residence where the defendants were staying. *Id.* The substances amounted to 0.53 grams of solid material and 91.9 grams of liquids. *Id.*

On appeal, the defendants argued that the phrase "mixture or substance containing a detectable amount of methamphetamine," as contained in Section 841(b)(1)(B), only applied to usable or marketable mixtures or substances. *See Kuenstler*, 325 F.3d at 1023. The defendants argued that they should have been sentenced to the 0.53 grams of the mixture which was found to be usable methamphetamine, and not the 91.9 grams which were unusable and represented toxic waste products. *Id.*

The panel rejected the defendants' arguments and concluded that the liquid solutions were a "mixture or substance" within the meaning of Section 841(b)(1)(B). *See Kuenstler*, 325 F.3d at 1023. The panel first acknowledged the two rationales relied on by the Supreme Court in *Chapman*, *i.e.*, the plain language of the statute and the legislative intent to

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panel. *See United States v. Jackson*, 554 F.3d 716, 717 (8th Cir. 2009).

punish drug trafficking pursuant to the market-oriented approach. *Id.* The panel concluded that both *Chapman* rationales supported the conclusion that the liquid solution amounted to a "mixture or substance." *Id.* The panel reasoned that the expert testimony established that the solution was a mixture within the plain meaning of the definition. *Id.* The panel further reasoned that the market-oriented analysis supported its findings because the methamphetamine manufacturing process involved the "creation of liquid solutions like those seized here, a process that results in a product for distribution." *Id.*

Finally, the Fifth and Ninth Circuits take a hybrid approach. These circuits adopt the market-oriented approach, but not with respect to methamphetamine. *See, e.g.*, *United States v. Palacios-Molina*, 7 F.3d 49, 54-55 (5th Cir. 1993) (holding that liquid used to transport cocaine was not to be counted as part of "mixture or substance" because it was not part of the usable drug mixture that would reach the market); *United States v. Robins*, 967 F.2d 1387, 1390 (9th Cir. 1992) (holding that cornmeal mixed with cocaine was not "mixture or substance" because the cocaine has to be separated before it could be effectively used). These circuits refuse to apply the market-oriented approach to methamphetamine based on the Supreme Court's analysis in *Chapman*. For example, the Fifth Circuit noted that prior to beginning its "market-oriented" analysis, the Supreme Court acknowledged that methamphetamine and PCP were treated differently under the sentencing

statute and the advisory Guidelines. Therefore, the Fifth Circuit stated that "it would appear that the market-oriented analysis was not intended to apply to methamphetamine or PCP." *See Palacios-Molina*, 7 F.3d at 53. *See also United States v. Sherrod*, 964 F.2d 1501, 1510 (5th Cir. 1992).

C. This Court should resolve the circuit split in favor of the market-oriented approach.

Adopting the approach of the First, Eighth and Tenth Circuits would not lead to potentially absurd results, which would not be consistent with Congress's intent in enacting the drug laws. For example, it would lead to the irrational result of rewarding the wrongdoer who is able to finish the manufacturing process. If one is caught with precursor liquids prior to finishing the manufacture of methamphetamine, he will arguably be subject to a stiffer penalty than one who finishes the manufacturing process and ends up with the distributable form of the drug in smaller amounts.

Likewise, it could have the effect of punishing the wrongdoer more severely than he should be punished. If one is caught with waste water that contains trace amounts of methamphetamine, he will arguably be subject to a stiffer penalty than one who is caught with the distributable form of the drug, which would be in smaller amounts. This person should be punished with respect to the amount of the distributable

drug that was produced, not with respect to the waste water that was left over from his production of methamphetamine, which would in all likelihood overstate the amount of methamphetamine which should be attributable to him.

As for the Fifth and Ninth Circuits' reasoning carving out methamphetamine from *Chapman's* market-oriented analysis, that too is flawed. The Seventh Circuit, in *Stewart*, reasoned that just because Congress permits sentencing based on the pure form of the drug in no way leads to the conclusion that a special rule should be carved out for methamphetamine. *See Stewart*, 361 F.3d at 380. Indeed, the statute punishes lesser amounts of the pure form of the drug similarly to higher amounts of a mixture of the drug (5-year mandatory minimum applies to 5 grams of pure form and 50 grams of mixture). *See* 21 U.S.C. § 841(b)(1)(B)(viii). This is simply a recognition by Congress that more pure forms of the drug exist, which in lesser amounts are deemed as dangerous as mixtures of the same substance. It does not mean, as the Fifth and Ninth Circuits have held, that Congress intended to treat them differently than other controlled substances. Nor can *Chapman* be read in that way. A close reading of *Chapman* reveals that the Court was referencing methamphetamine and PCP as a point of reference to illustrate the point it was making. It was not intended to exempt these drugs from the market-oriented approach that the Court deemed to be of

overriding importance to Congress in enacting the drug laws.

As for whether a solution should be considered a mixture just because it may be marketable, the Seventh Circuit acknowledged that the solution may have some value, but it clearly would be lower because some labor would have to be expended to remove the usable ingredients. However, the Court noted that "[i]t would be illogical to impose higher penalties for a solution that has less value than the pure drug contained in the solution merely because the solution arguably could be sold to someone at some price." *See Stewart*, 361 F.3d at 382.

Finally, the Court should resolve the circuit split because of the detrimental effect it has had on the sentencing of similarly situated criminal defendants. For example, if Clarke had been convicted in Illinois, as opposed to Missouri, she would have had the benefit of the *Stewart* decision and thus would have been subjected to a significantly lower sentence. This, of course, leads to widely divergent sentences based simply on the variable of where a criminal defendant was indicted and convicted. Obviously, this cannot be allowed to stand and the Court should step in and resolve the confusion so that such disparities do not persist.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 08-2778

United States of America,	*	
Appellee,	*	Appeal from the
	*	United States District
v.	*	Court for the Eastern
Pamela Clarke,	*	District of Missouri.
Appellant.	*	

Submitted: February 10, 2009
Filed: May 8, 2009

Before RILEY, SMITH, and SHEPHERD, Circuit Judges.

RILEY, Circuit Judge.

A federal grand jury indicted Pamela Clarke (Clarke) on five federal drug charges related to manufacturing and distribution of methamphetamine. Before trial, the district court[1] denied Clarke's motion

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[1] The Honorable Stephen N. Limbaugh, Sr., United States District Judge for the Eastern District of Missouri, now retired,
(Continued on following page)

to suppress evidence obtained during police searches of Clarke's residence. At trial, the district court allowed the government to cross examine Clarke regarding Clarke's methamphetamine use and pseudoephedrine purchases, and denied Clarke's motion for judgment of acquittal. A jury found Clarke guilty on four of the five charges. At sentencing, the district court overruled Clarke's objection to the amount of methamphetamine involved in the crimes, and sentenced Clarke to 63 months imprisonment. Clarke now challenges the district court's rulings and her sentence. We affirm.

I. BACKGROUND

On August 23, 2005, Officer Timothy Groat (Officer Groat) of the Jefferson County, Missouri, Sheriff's Office received an anonymous tip that methamphetamine was being manufactured at Clarke's home. Officer Groat responded to the tip with several other officers, and upon arrival, the officers smelled a chemical odor around the home which they recognized as consistent with methamphetamine manufacturing. The officers attempted to reach someone in the house by knocking on the door and calling the telephone number listed for the address. After no response, the officers decided to enter the home to

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adopting the report and recommendations of the Honorable Frederick R. Buckles, United States Magistrate Judge for the Eastern District of Missouri.

ensure the safety of anyone possibly inside. The officers donned air purifying respirators as a precaution to possible methamphetamine manufacturing fumes, and forcibly entered the home.

When the officers entered Clarke's home, they saw Clarke lying on the floor. The officers removed Clarke from the home to ensure Clarke's safety. The officers called the fire department and searched the residence looking for other people inside the home. The fire department responded and ventilated the home. Clarke then gave Officer Groat oral and written consent to search the home. The officers' search of Clarke's residence and a nearby shed revealed items typically used to manufacture methamphetamine, including pseudoephedrine pills. The officers arrested Clarke, and after being Mirandized,[2] Clarke stated the officers should only find pill binder in her home. Clarke also disclosed she received some pills from a man named Clark and had broken the pills down the day before.

On September 7, 2006, Officer Groat again received information of methamphetamine manufacturing at Clarke's home. Officer Groat responded with several officers, knocked on Clarke's door, and identified himself as with the Sheriff's Office. Clarke answered, opened the door, and gave Officer Groat consent to search the premises. After two other people exited the house, the officers searched Clarke's home

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[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

and found several items associated with methamphetamine manufacturing. The officers' search of the shed next to Clarke's home revealed a mason jar containing a biphase liquid consistent with methamphetamine production. Officer Groat took three samples of the biphase liquid. Clarke was arrested and Mirandized. Clarke told Officer Groat the biphase liquid belonged to her neighbor, who cooked methamphetamine. The samples subsequently tested positive for containing methamphetamine.

A federal grand jury indicted Clarke on five counts, including: (1) conspiracy to possess pseudoephedrine knowing it would be used to manufacture methamphetamine, in violation of 21 U.S.C. §§ 841(c) and 846; (2) possession of pseudoephedrine knowing it would be used to manufacture methamphetamine, in violation of 21 U.S.C. § 841(c); (3) conspiracy to manufacture fifty or more grams of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. §§ 841(a), 841(b)(1)(B)(viii), and 846; (4) possession with intent to distribute fifty or more grams of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(viii) and 18 U.S.C. § 2; and (5) maintaining a drug involved premises, in violation of 21 U.S.C. § 856(a)(2).

Before trial, Clarke moved to suppress (1) the evidence obtained during the two searches of Clarke's home, and (2) Clarke's statements to Officer Groat. The district court referred the motion to the magistrate who issued a report and recommendation to

deny Clarke's motion. The magistrate found probable cause and exigent circumstances allowed the officers to make the initial warrantless entry of Clarke's home on August 23, 2005, and Clarke gave valid consent to the searches on August 23, 2005, and September 7, 2006. The magistrate also found Clarke's statements were admissible because Clarke voluntarily waived her *Miranda* rights, and the officers had probable cause to arrest Clarke on both occasions. The district court adopted the magistrate's report and recommendations and denied Clarke's motion to suppress.

Clarke's trial began on May 12, 2008. During the government's case-in-chief, the parties jointly stipulated the three samples of biphase liquid seized by Officer Groat on September 7, 2006, weighed a total of 62.46 grams and contained methamphetamine. At the close of the government's evidence, Clarke made a general motion, without argument, for judgment of acquittal.[3] The district court denied the motion, stating there was sufficient evidence to submit all five counts to the jury. Clarke then presented her evidence and testified. During the government's cross examination of Clarke, the government questioned Clarke about Clarke's prior methamphetamine use, Clarke testing positive for methamphetamine on two separate occasions after her arrest and before

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[3] Clarke specifically moved "as a matter of law that the case is insufficient to submit to the jury." The district court converted the motion to one for judgment of acquittal.

trial, and Clarke's pseudoephedrine purchases after the September 7, 2006 search of Clarke's home. Clarke's counsel objected to the questioning on Clarke's prior methamphetamine use and Clarke's pseudoephedrine purchases. The district court overruled the objections. At the close of evidence, Clarke renewed, without argument, her motion for judgment of acquittal. The district court again denied the motion. The jury acquitted Clarke on count one of the indictment, but found Clarke guilty on counts two, three, four, and five.

After the jury verdict, a presentence investigation report (PSR), prepared for Clarke, calculated an advisory United States Sentencing Guidelines (U.S.S.G. or Guidelines) range of 63 to 78 months imprisonment. In the PSR, the 62.46 grams of biphase liquid containing methamphetamine stipulated to at trial was used to calculate an offense level of 26 for Clarke. Clarke's counsel objected to using the full amount of the biphase liquid to determine Clarke's offense level, arguing the biphase liquid was waste water which could not be counted as a "mixture or substance" under 18 U.S.C. § 841(b) or U.S.S.G. § 2D1.1. The district court overruled Clarke's objection, adopted the PSR calculation for Clarke's advisory Guidelines range, and sentenced Clarke to the bottom of the range, 63 months imprisonment. This appeal follows.

II. DISCUSSION

A. Motion for Judgment of Acquittal

Clarke first argues the district court erred in denying her motion for judgment of acquittal because the government did not prove Clarke "possessed more than 50 grams of a mixture [or] substance containing methamphetamine." In support of her argument, Clarke urges us to adopt a "market approach" used by some other Circuit Courts of Appeals which only attributes to the defendant the "usable or ingestible" methamphetamine contained in a mixture or substance, rather than the entire amount of any liquid containing methamphetamine. Clarke contends there was insufficient evidence to submit counts three and four to the jury because the biphase liquid was waste water which was not usable, marketable, or traffickable, and the government failed to prove the actual amount of methamphetamine in the biphase liquid.[4]

We review de novo a district court's denial of a motion for judgment of acquittal. *United States v. Reddest*, 512 F.3d 1067, 1069-70 (8th Cir. 2008). We

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[4] Although Clarke does not specifically state in her brief which counts she believes had insufficient evidence for conviction, we assume Clarke is only challenging the district court's denial of her motion for judgment of acquittal on counts three and four because these are the only counts which required the government to prove the existence of fifty or more grams of a mixture or substance containing a detectable amount of methamphetamine.

"view the evidence in the light most favorable to the Government" and determine "whether the evidence is sufficient to permit a reasonable jury to conclude that the defendant is guilty beyond a reasonable doubt."[5] *Id.* at 1070. Clarke failed to argue at trial that only the "usable or ingestible" amount of methamphetamine in the biphase liquid could be used to prove the weight of the methamphetamine. "'An argument not raised below cannot be raised on appeal for the first time unless the obvious result would be a plain miscarriage of justice.'" *United States v. Rees,* 447 F.3d 1128, 1130 (8th Cir. 2006) (quoting *United States v. Gutierrez,* 130 F.3d 330, 332 (8th Cir. 1997)).

Under 21 U.S.C. § 841(a)(1), a person cannot "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." Any defendant convicted under § 841(a)(1) is subject to a mandatory minimum five-year prison sentence under 21 U.S.C. § 841(b)(1)(B)(viii) if the crime involved "50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers."

In *United States v. Kuenstler,* 325 F.3d 1015, 1023 (8th Cir. 2003), this court discussed whether "the

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[5] Clarke frames our inquiry as a question of sufficiency of the evidence. There is no distinction between our review of the sufficiency of the evidence and the denial of a motion for judgment of acquittal. *See Reddest,* 512 F.3d at 1069-70.

§ 841(b)(1)(B) phrase 'mixture or substance containing a detectable amount of methamphetamine' only applies to usable or marketable mixtures or substances." Relying on the reasoning of *Chapman v. United States,* 500 U.S. 453, 461 (1991), which held blotter paper customarily used to distribute LSD was a "'mixture or substance containing a detectable amount' of LSD" under § 841(b)(1)(B), our court concluded solutions containing both solid methamphetamine and toxic liquid "fall within the scope of § 841(b)(1)(B)," and the total weight of the solution is attributed to the defendant. *Kuenstler,* 325 F.3d at 1023. A panel of this court recently reaffirmed the holding of *Kuenstler,* stating "the total weight of the solution, not just the weight of the solid methamphetamine, should be counted under § 841" in spite of decisions "from other circuits which limit the relevant weight to the actual methamphetamine." *United States v. Gentry,* 555 F.3d 659, 665, 666 (8th Cir. 2009). We are bound by *Kuenstler* and *Gentry. See United States v. Jackson,* 554 F.3d 716, 717 (8th Cir. 2009) ("'a panel of this Court is bound by a prior Eighth Circuit decision unless that case is overruled by the Court sitting en banc'" (quoting *United States v. Wright,* 22 F.3d 787, 788 (8th Cir. 1994))).

The district court did not commit a "plain miscarriage of justice" in denying Clarke's motion for judgment of acquittal. Clarke stipulated that the biphase liquid collected by Officer Groat weighed over fifty grams, specifically 62.46 grams, and contained methamphetamine. The government's expert witness

also testified that liquids like the biphase liquid found at Clarke's house can be converted to usable form, and are commonly trafficked or stored for future use in methamphetamine manufacturing. Based on these facts, the entire weight of the biphase liquid justly is attributed to Clarke, and the evidence was sufficient for a reasonable jury to conclude Clarke possessed "50 grams or more of a mixture or substance containing a detectable amount of methamphetamine." *See* 21 U.S.C. § 841(b)(1)(B)(viii).

B. Objection at Sentencing

Clarke also argues the district court erred in overruling her objection to using the full amount of the biphase liquid to determine her sentence. Relying on her argument that only the "usable or ingestible" methamphetamine in the biphase liquid could be attributed to her, Clarke maintains the district court improperly used the full amount of the biphase liquid to apply the five year mandatory minimum of 21 U.S.C. § 841(b)(1)(B) and to calculate Clarke's base offense level for Clarke's advisory Guidelines range.

"We review a district court's interpretation of a sentence-enhancement statute de novo." *United States v. Speakman,* 330 F.3d 1080, 1081 (8th Cir. 2003). "Before imposing a sentence, the district court must begin by correctly calculating the applicable advisory Guidelines range." *United States v. Viezcas-Soto,* ___ F.3d, ___, No. 08-2339, 2009 WL 961277, at *1 (8th Cir. Apr. 10, 2009) (citation omitted). We

review a district court's application of the Guidelines de novo, *United States v. Blankenship*, 552 F.3d 703, 704 (8th Cir. 2009), and "a sentencing court's finding of fact regarding the quantity of drugs for clear error." *United States v. Palega*, 556 F.3d 709, 716 (8th Cir. 2009) (citing *United States v. Atkins*, 250 F.3d 1203, 1211 (8th Cir. 2001)).

The district court provided two reasons for overruling Clarke's objection to using the full amount of the biphase liquid to determine Clarke's sentence. The district court first noted the jury was instructed, in order to find Clarke guilty on counts three and four, the jury must find the counts involved fifty or more grams of a mixture or substance containing methamphetamine. Because the jury found Clarke guilty on these counts, the district court declined to speculate on, or second guess, the jury's findings, and opined it was not Congress's intent to have the district court make an independent finding at sentencing regarding the amount of pure methamphetamine in a mixture or substance. Second, the district court followed this court's decision in *Kuenstler* instead of decisions from other Circuit Courts of Appeals cited by Clarke.

The district court did not commit error in finding the five-year mandatory minimum sentence applied to Clarke because the entire weight of the biphase liquid was properly attributed to Clarke under 21 U.S.C. § 841(b)(1)(B). *See Gentry*, 555 F.3d at 666; *Kuenstler*, 325 F.3d at 1023.

The district court also did not err in applying the entire weight of the biphase liquid to determine Clarke's advisory Guidelines range. Under U.S.S.G. § 2D.1.1(c)(7), a base offense level of 26 is assigned to a drug crime involving between fifty and two hundred grams of methamphetamine. Note B to U.S.S.G. § 2D1.1(c) states, "In the case of a mixture or substance containing . . . methamphetamine, use the offense level determined by the entire weight of the mixture or substance." Application Note 1 to U.S.S.G. § 2D1.1 declares a mixture or substance "has the same meaning as in 21 U.S.C. § 841," but "does not include materials that must be separated from the controlled substance before the controlled substance can be used . . . [such as] waste water from an illicit laboratory used to manufacture a controlled substance."[6]

Although *Kuenstler* and *Gentry* control the amount of the biphase liquid attributed to Clarke under 21 U.S.C. § 841, these cases did not address the definition of "mixture or substance" under U.S.S.G. § 2D1.1 as applied to mixtures or substances containing methamphetamine, nor has another decision of this court addressed the issue. *See Gentry*, 555 F.3d at 665-66; *Kuenstler*, 325 F.3d at 1019. We,

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[6] In the district court, Clarke mentioned Application Note 1 to U.S.S.G. § 2D1.1 in her objections to the PSR, but neither party addresses in their appeal briefs the possible link between *Kuenstler* and *Gentry* and Application Note 1. We choose to raise and discuss the issue only briefly.

however, need not reach the issue in this case because the record before us reveals there was a preponderance of the evidence that the biphase liquid was not "waste water" which should be excluded under the Guidelines. *See United States v. Berger*, 553 F.3d 1107, 1109 (8th Cir. 2009) ("This court may affirm the judgment of the district court on any basis supported by the record"); *Atkins*, 250 F.3d at 1211 (stating, at sentencing, "the government must prove the quantity of drugs attributed to a defendant by a preponderance of the evidence"). Clarke stipulated at trial that the biphase liquid weighed over fifty grams and contained methamphetamine, and the government's expert testified at trial that the biphase liquid could be usable, traffickable, or stored for future methamphetamine manufacturing. In contrast, Clarke submitted no evidence that the biphase liquid was "waste water." Therefore, the district court did not clearly err in using the entire amount of the biphase liquid to calculate Clarke's base offense level under U.S.S.G. § 2D1.1.

C. Cross Examination of Clarke

Clarke next asserts the district court erred when the district court allowed the government to cross examine Clarke regarding her pseudoephedrine purchases and positive drug tests. Clarke maintains the evidence was improper under Fed. R. Evid. 404(b) because (1) the government failed to give notice of its intent to rely on this evidence; (2) the evidence only showed Clarke's propensity to use and manufacture

methamphetamine; (3) the evidence lacked reliability; and (4) the district court gave no limiting instruction.

We review a district court's evidentiary rulings under Fed. R. Evid. 404(b) for abuse of discretion. *See United States v. Hawkins*, 548 F.3d 1143, 1146 (8th Cir. 2008). "We construe Rule 404(b) broadly as a rule of inclusion, 'and we will reverse only when such evidence clearly had no bearing on the case and was introduced solely to prove the defendant's propensity to commit criminal acts.'" *Id.* (quoting *United States v. Anthony*, 537 F.3d 863, 865 (8th Cir. 2008)).

Clarke did not argue to the district court that evidence of Clarke's pseudoephedrine purchases was improper under Rule 404(b), and although Clarke objected to a question by the government on her prior methamphetamine use, Clarke did not object to the government's questions regarding Clarke's positive drug tests. Thus, we review these rulings for plain error, which requires Clarke "to prove that there was (1) error, (2) that was plain, and (3) that affected substantial rights." *United States v. Eagle*, 515 F.3d 794, 801 (8th Cir. 2008) (citations omitted). Reversal under plain error review is only warranted if "'the error has prejudiced the substantial rights of a party and would result in a miscarriage of justice if left uncorrected.'" *United States v. Porchay*, 533 F.3d 704, 708 (8th Cir. 2008) (quoting *Olson v. Ford Motor Co.*, 481 F.3d 619, 627 (8th Cir. 2007)).

Fed. R. Evid. 404(b) excludes evidence of "crimes, wrongs, or acts" which are offered to show a defendant's propensity, or character, to commit a crime, but does not exclude the evidence "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In criminal cases, Rule 404(b) requires the prosecution to give pretrial notice, unless the district court excuses the notice at trial, regarding the "general nature" of any Rule 404(b) evidence the government "intends to introduce at trial."

The district court found the government's questioning on Clarke's pseudoephedrine purchases was admissible as both impeachment evidence and proof of the charged conspiracy in count one of the indictment. This was not error. We have consistently held "'crimes or acts which are "inextricably intertwined" with the charged crime are not extrinsic and Rule 404(b) does not apply.'" *United States v. Aldridge*, 561 F.3d 759, 766 (8th Cir. 2009) (quoting *United States v. Adams*, 401 F.3d 886, 899 (8th Cir. 2005)). Count one of the indictment charged Clarke with conspiracy to possess pseudoephedrine between August 23, 2005, and October 3, 2007, knowing the pseudoephedrine would be used to manufacture methamphetamine. The government questioned Clarke about her pseudoephedrine purchases from September 12, 2006, through March 18, 2007. The government's questioning provided direct evidence of Clarke's possession of pseudoephedrine during the alleged conspiracy of count one, and was clearly relevant to establishing

Clarke's participation in the conspiracy. Thus, the evidence was outside the province of Rule 404(b), because it was "inextricably intertwined" with the charged conspiracy, and the district court did not commit any error, much less plain error, in allowing the government to inquire about these purchases during Clarke's cross examination. *See United States v. O'Dell*, 204 F.3d 829, 833-34 (8th Cir. 2000) (holding testimony about a defendant's possession of methamphetamine was "inextricably intertwined" with the charged conspiracy to distribute methamphetamine).

The district court also did not commit error under Rule 404(b) by allowing the government to cross examine Clarke regarding her positive methamphetamine tests because the questions were not subject to Rule 404(b), but rather, were offered to impeach, under Fed. R. Evid. 608(b), Clarke's testimony denying methamphetamine manufacturing, possession, and use. Under Fed. R. Evid. 608(b), a witness may be cross examined regarding specific incidents and actions which attack or support the witness's character for truthfulness, but these acts cannot be proved by extrinsic evidence.

During direct examination, Clarke testified she did not recognize some of the items seized at her house which had been identified by the government as commonly used for methamphetamine manufacturing. Clarke also testified, during 2005 and 2006, she did not engage in methamphetamine manufacturing, breaking down of pills, mixing combustible

substances, or possessing diet pills and cold pills to manufacture methamphetamine. On cross examination, Clarke testified she previously had used methamphetamine, but did not use methamphetamine in 2005 and 2006. Clarke also testified she inadvertently took diet pills, after she was indicted, which had been laced with methamphetamine. Because Clarke denied any connection to methamphetamine manufacturing, possession, or use, the government could attempt to impeach Clarke with questions regarding Clarke's positive methamphetamine tests. The positive tests contradicted Clarke's denials about methamphetamine possession and use and attacked Clarke's truthfulness, and the government did not offer extrinsic evidence of the positive tests. Thus, the evidence was proper under Rule 608(b), and the district court did not commit any error.

Lastly, because Rule 404(b) evidence was not involved, a limiting instruction was not necessary.

D. Denial of Motion to Suppress

Clarke finally contends the district court erred in denying her motion to suppress the evidence obtained during the August 23, 2005 search of Clarke's home.[7]

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[7] Clarke has not appealed the district court's findings regarding Clarke's consent after the initial entry on August 23, 2005, and has also not appealed the district court's denial of Clarke's motion to suppress the evidence obtained during the September 7, 2006 search.

Clarke argues the warrantless search was unlawful because the search did not fall within the exigent circumstances exception to the warrant requirement. Clarke asserts the general anonymous tip regarding methamphetamine manufacturing and the general smell of an odor associated with methamphetamine manufacturing did not create an exigent circumstance which authorized the officers to make a warrantless entry into Clarke's home. Clarke maintains, because exigent circumstances did not exist for the initial entry into Clarke's home, Clarke's consent to the subsequent search and the evidence obtained during the search were tainted, and should have been excluded.

We review "'the district court's factual determinations in support of its denial of a motion to suppress for clear error and its legal conclusions de novo.'" *United States v. Hogan*, 539 F.3d 916, 921 (8th Cir. 2008) (quoting *United States v. Harper*, 466 F.3d 634, 643 (8th Cir. 2006)). "We 'must affirm an order denying a motion to suppress unless the decision is unsupported by substantial evidence, is based on an erroneous view of the applicable law, or in light of the entire record, we are left with a firm and definite conviction that a mistake has been made.'" *United States v. Castellanos*, 518 F.3d 965, 969 (8th Cir. 2008) (quoting *United States v. Varner*, 481 F.3d 569, 571 (8th Cir. 2007)).

The Fourth Amendment prohibits a warrantless entry of a home by law enforcement officers unless

the circumstances are within a reasonableness exception to the warrant requirement. *Castellanos*, 518 F.3d at 969. We have recognized a reasonableness exception to the warrant requirement which allows a non-consensual, warrantless search of a home if the search is supported by probable cause and exigent circumstances. *See Hogan*, 539 F.3d at 922. Under the exigent circumstances exception, police may take immediate action "if lives are threatened, a suspect's escape is imminent, or evidence is about to be destroyed." *Id.* (citations omitted). "In certain narrow situations, therefore, exigency may be substituted for a warrant, but probable cause must be present before either a warrant or exigency will allow a search." *Kleinholz v. United States*, 339 F.3d 674, 676 (8th Cir. 2003) (per curiam). Probable cause is established "'when, given the totality of the circumstances, a reasonable person could believe there is a fair probability that contraband or evidence of a crime would be found in a particular place.'" *Id.* (quoting *United States v. Fladten*, 230 F.3d 1083, 1085 (8th Cir. 2000)).

In this case, the officers had probable cause to believe methamphetamine was being manufactured in Clarke's home. The officers received an anonymous tip that methamphetamine manufacturing was occurring. Upon arrival, Officer Groat smelled an odor which, based on his training and extensive experience, he recognized as consistent with methamphetamine manufacturing. These facts support a determination of probable cause. *See Kleinholz*, 339

F.3d at 677 (stating, an officer smelling an odor of a substance commonly used in methamphetamine manufacturing "might alone support a finding of probable cause," and "certainly such an odor coupled with other facts[, including an anonymous tip,] support a finding of probable cause").

Exigent circumstances also existed. Because the officers had probable cause to believe methamphetamine was being produced in Clarke's home, the officers reasonably concluded there was a potential threat to the safety of the officers, anybody inside the home, and anyone in the surrounding area. *See United States v. Walsh*, 299 F.3d 729, 734 (8th Cir. 2002) (declaring, "[o]ur court has consistently considered safety factors in determining whether exigent circumstances existed," and "[t]he potential hazards of methamphetamine manufacture are well documented, and numerous cases have upheld limited warrantless searches by police officers who had probable cause to believe they had uncovered an ongoing methamphetamine manufacturing operation"). The officers' concern for the safety of everyone involved in the situation was reasonably heightened after the officers were unable to contact anyone inside the home after knocking and calling the listed telephone number. *See id.* (holding exigent circumstances existed when there was an odor of ether, possible equipment for methamphetamine manufacturing, and the officers could not determine whether anyone was hiding or lying unconscious, or whether there was a dangerous heat source, in the suspected methamphetamine lab). We therefore conclude the district

court did not commit error in denying Clarke's motion to suppress because the warrantless entry of Clarke's home on August 23, 2005, was justified by probable cause and exigent circumstances.

III. CONCLUSION

We affirm Clarke's sentence and the district court's judgment.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 08-2778

United States of America,

Appellee

v.

Pamela Clarke,

Appellant

Appeal from U.S. District Court for
the Eastern District of Missouri – St. Louis
(4:07-cr-00577-SNL-1)

MANDATE

In accordance with the opinion and judgment of 05/08/2009, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

July 23, 2009

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	4:07 CR 577 SNL
vs.	)	St. Louis, Missouri
PAMELA CLARKE,	)	February 14, 2008
Defendant.	)	

Volume 3
TRANSCRIPT OF TRIAL
BEFORE THE HONRABLE STEPHEN N. LIMBAUGH & JURY

APPEARANCES:

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St. Louis, MO 63102

* * *

[40] JULY 29, 2008

THE COURT: This is now the case of United States versus Pamela Clarke. We are here for sentencing.

Miss Clarke, you can just have a seat. We have a number of legal issues we need to resolve first.

At this time the government appears by Assistant United States Attorney Jeannette Graviss. The defendant appears in person and by her attorney, Adam Fein.

The previous attorney that represented Miss Clarke was Robert Taaffe. He's been allowed to withdraw and Mr. Fein has entered his appearance.

Mr. Fein on behalf of his client has filed objections to the presentence investigation report and we are ready to consider these objections at this time.

The government has also responded to the objections to the report. Basically the objections have to do with two areas of the report. The first is an objection to paragraphs eight, nine, ten and 11 which constituted the greater portion of what is called the offense conduct in the report.

What the probation officer did in preparing those paragraphs in the offense conduct was to set out some of the material that was adduced or the evidence that was adduced at the time the case was ultimately submitted to the jury.

The defendant in those objections eight, nine, ten and 11 deny all of that material and in particular deny [41] culpability and deny the methodology by which the probation officer phrased the offense conduct.

I'm going to overrule those objections. I think basically they are for the purpose of simply taking the position that the defendant did at time of the trial. She had entered a plea of not guilty and she maintained that position throughout the entire trial and she is entitled to continue to maintain that position and I'm assuming that those denials just simply restate her position in these denials; is that correct, Mr. Fein?

MR. FEIN: It is correct, Your Honor.

THE COURT: All right. Since the jury did hear the evidence in this case and entered a verdict in this matter, I am going to overrule the denial of the objections to paragraph eight, nine, ten and 11 to restate what happened in this case.

There were five counts submitted to the jury. The defendant was found not guilty in Count 1 but guilty in Counts 2, 3, 4 and 5.

The second objection basically has to do with the way in which the probation officer elected to calculate the base offense level. This is on paragraph 18, page three of the report. The portion of paragraph 18 as set out by the probation officer reads the base offense level, the guideline for violations of 21 United States

Code, Section 841(a)(1) [42] and 841(c)(1) is found in Section 2D1.1(a)(3) which refers to the drug quantity table. The defendant possessed 62.4800 grams of methamphetamine and that results, according to the table mentioned, in a base offense level of 26. The defendant objects to that calculation principally because of the methodology used in purportedly counting unusable liquid waste products in the quantity of the methamphetamine involved. It is the defendant's position that the unusable liquid waste should not be included in the calculation of the quantity of the drug and if you did not do so, then the quantity would be less than 62.4800 grams of methamphetamine and, accordingly, the base offense level of 26 would be substantially reduced.

The government takes issue with this for a variety of reasons and I won't go into them now because the parties at this stage can go ahead and supplement their positions.

All right. Mr. Fein, why don't you supplement your position as to the objection to the calculation of the base offense level.

MR. FEIN: Thank you, Your Honor.

As a preliminary matter, let me address the term waste product that I used in the text of my objections to the PSR.

The government takes some note of that term and it may not be that the products were waste products. The point remains that whatever that liquid

was excluding the trace [43] analysis of methamphetamine therein, it was not usable or ingestible, which is the essential point.

The case that I rely on admittedly is a case not from the circuit, case from the Seventh Circuit, *United States v. Stewart*, 361 F.3d, 373, 382, Seventh Circuit 2004 and *Kuenstler* case, *United States v. Kuenstler*, 325 F.3d, 1015 from 2003. *Kuenstler*, the Eighth Circuit determined that these unusual ingestible products may be included in the total quantity determination of methamphetamine cases and other cases.

In *Stewart*, the Seventh Circuit took a directly contrary policy and held not – both cases rely on *Chapman*, United States Supreme Court case having to do with LSD. Seems to me on my reading of *Stewart*, *Kuenstler* and other cases from other circuits that the better reasoned decision is *Stewart* and I understand this Court must follow Eighth Circuit law and largely preserve this matter for appeal, but the point in *Stewart* is this: That only those amounts of methamphetamine that are usable and ingestible may be included in the drug quantity calculation and in this case, products that were not usable, not ingestible, were included. As a result of those additional products' inclusion of the drug quantity determination, Miss Clarke's total drug quantity increased to over 50 grams and, in fact, increased to 62.46 grams and as a result, triggered the mandatory [44] minimum sentence of five years that the government and the probation asked this Court to apply.

In my estimation, the five year mandatory minimum ought not apply. It ought not apply because those other products included with the methamphetamine ought not be included in the drug quantity determination. Because the amount of methamphetamine in fact is unknown, that would simply leave the pseudoephedrine as the basis for the sentencing. The total quantity of pseudoephedrine found in this case is 4.18 grams. That would produce an offense level of 20.

The intersection of 20 in criminal history category one produces the offense level of 33 to 41 months and, therefore, it is our contention that the appropriate range of punishment under the advisory guidelines is 33 to 41 months rather than 63 to 78 calculated in the presentence investigation report, Your Honor.

THE COURT: All right. Thank you, sir.

For the government?

MS. GRAVISS: Your Honor, recognizing the case of *Stewart* from the Seventh Circuit, my argument would be that we're not in the Seventh Circuit, we're in the Eighth Circuit and the Seventh Circuit cases are not controlling for this Court.

But even looking at *Stewart* and the analysis of *Stewart*, given the situation that we have in this particular [45] case and the testimony from the expert witness, I believe that the conclusion can be to that this liquid was in fact marketable, so I don't

think we need to get to the point where we're saying this liquid is not marketable, therefore, we have to figure out what to do with it. My argument is, yes, this liquid is marketable and the reason for that is any point during the process of manufacturing methamphetamine you have a product, a usable product that could be used in the next stage of manufacturing methamphetamine, and at any point during the process if you're missing that product of the particular phase of manufacturing then you don't get to the end point where you do have usable ingestible or smokable methamphetamine. That is one portion of the argument.

The second portion of the argument is that the Eighth Circuit has already decided that even if it is waste product, and waste product would be the leftovers after the manufacture of methamphetamine which actually wasn't the evidence in this case but even if you are there, then for the purposes of the mandatory minimum sentence, that waste product can be and should be counted without regard to what the sentencing guidelines have to say because the conclusion that the Court came to in *Kuenstler* is that that product, whatever it is, waste product or actual mixture or substance is a mixture or substance as Congress intended when enacting Chapter 841.

[46] And then the third part of my argument is that the jury came to the conclusion that this was a usable product when it rendered its verdict that the quantity of mixture or substance containing methamphetamine was greater than 50 grams and that some

portion or all of the substance was to be distributed to another person.

THE COURT: Rebuttal, Mr. Fein.

MR. FEIN: Thank you, Your Honor.

The government equates the term marketable with use in any process, not just ingestible, so the government does not see – does not deem synonymous the terms of marketable and ingestible. It claims that a product is marketable, can be used in a myriad of ways, even to be used further in the manufacturing process.

I concede the points that the government makes regarding *Stewart* applicability in the Eighth Circuit, nonetheless, *Stewart* is very clear that what the term marketable means is ingestible, usable, that is bringing it into the body, to use the drug to bring to the body. There is no evidence – I think it's undisputed that the liquids in this case that were combined with methamphetamine are not usable in that sense, so within the meaning of *Stewart* which is consistent with *Chapman* it would not be a usable product, it should be excluded.

I do concede, though, Eighth Circuit *Kuenstler* for the [47] time being is the appropriate law and I raise this issue to preserve it for appeal.

The government also mentions the jury's verdict. The jury found that it was a usable mixture or substance. I was not the trial lawyer and my firm was not involved in the trial. I suspect that there was not

a jury instruction delivered to those jurors asking them to expressly find whether or not the methamphetamine mixture, rather, the product of the methamphetamine was usable in the sense as contained in *Chapman* and its progeny like, *Stewart*, so don't think it's particularly relevant to the analysis.

I'll leave my remarks at that, Your Honor.

THE COURT: All right. I'm going to deny the objection for at least two reasons.

The one that Mr. Fein has just mentioned as to the jury finding, I want to consider that first. In the instructions that the Court gave to the jury as to Count 3 and the essential elements of Count 3, the instruction read, number one, that a person manufactured a mixture or substance containing methamphetamine. Number two, that the defendant knew that the substance such person manufactured was a mixture or substance containing methamphetamine. Three, that the amount of methamphetamine involved in the offense was more than 50 grams.

Now the jury was instructed that as to Count 3 they had [48] to find from the evidence that the amount of methamphetamine was more than 50 grams. That's the third essential element.

I don't think I can speculate as to what the jury may have discussed as to whether it was pure methamphetamine or contained some methamphetamine and some waste product or some other products, at least they knew they had to find from the evidence

that there was more than 50 grams of methamphetamine. They found the defendant guilty in Count 3, so I have to determine that they made that decision properly in accordance with the instruction given.

In the instruction as to Count 4 of the indictment, the essential elements were, one, the defendant possessed a mixture or substance containing methamphetamine, a Schedule II controlled substance. Two, the defendant knew that she possessed a mixture or substance containing methamphetamine. Three, the defendant intended to distribute some or all of the mixture or substance containing methamphetamine. And four, the amount involved in the offense was 50 grams or more of a mixture or substance containing methamphetamine.

Now here again, the fourth essential element was that was – the jury must find there was more than 50 grams of methamphetamine.

Now I think also that the element contains the language that it is not necessary in both of those counts that there be pure methamphetamine. Essential elements states was 50 [49] grams or more of a mixture or substance containing methamphetamine.

The evidence showed that there was methamphetamine in the mixture or substance that weighed at least 50 grams, so, again, I don't think I'm in a position to second guess what the jury elected to find as to whether there was pure or only partial amounts of pure methamphetamine in the total amount that was weighed and what the witnesses testified to.

In addition, I am inclined to think that the interpretation of all of the laws passed by Congress concerning illegal drugs and the quantities do not necessarily encompass pure, illegal drugs. For example, we frequently try cases, I know Mr. Fein has tried many cases, in which there were other illegal substances, heroin, crack cocaine, Ectasy, and I won't go into the technical name, but I think it is rare, if ever, that there is pure heroin or pure cocaine in these cases. As a matter of fact, many of the lab people who testify sometimes state the quantity of the pure heroin, for illustration, or the pure crack cocaine as perhaps being 75 percent so obviously the 25 percent is some kind of waste product or some product not containing the illegal drug, so I think if we follow the position of *Stewart* case, in almost every illegal drug situation you're going to have to have testimony of what the pure drug volume was in order to determine these amounts.

[50] This raises another question that I think is appropriate for me to decide. Since the jury found in both of these counts a quantity of the illegal drug involved, and there's no question they had to find that to reach these verdicts, that for sentencing purposes the Court must ascertain the pure quantity of the drug. I think if we were going to do that all of the time, we'd have another complete sentencing hearing in all illegal drug cases. I don't think this is what Congress intended and, accordingly, for the reason that the jury found that there was this quantity of illegal drug involved, that that is the quantity that

the Court should use for sentencing purposes, particularly in counting or calculating the base offense level.

Now the second reason is I'm – I'm not going to determine that a case from another circuit is more well-reasoned or sets out better law than what is already set out in this circuit.

I'm prepared here to follow the *United States v. Kuenstler*, 325 F.3d, 1015, a 2003 Eighth Circuit case in the resolution of this case. While one could determine that the *Stewart* case that the defendant is relying on in the Seventh Circuit could be a well-reasoned opinion, I do not think it is so well-reasoned as to cause this Court to adopt it as opposed to the decision of the Eighth Circuit which I think should be controlling here.

[51] For all of these reasons, therefore, I determine that the calculation of the base offense level of 26 was properly done by the probation officer and I will overrule the objections that the defendant has made as to the methodology in making those calculations.

Now the further objections to the report basically have to do with the initial calculation of the base offense level. Obviously, if I accepted the position of the defendant, then we would have to recalculate the total offense level, the 60 year – the 60 month mandatory minimum term of imprisonment conceivably wouldn't apply. The calculation of the range of

punishment would be different on the basis of the position of the defendant.

So all of the remaining portions of the objections of the defendant are also going to be denied because of the ruling that I made as to the proper calculation of the base offense level.

Are there any other objections to the report that counsel wish to make?

MR. FEIN: No, Your Honor.

If I could, though, if I could just add one comment, one point of clarification as well.

With respect to *Stewart*, in that case and the cases that follow it, their claim is not that the drug must be pure. There are certainly occasions in which there are [52] cutting agents and other items placed and mixed with narcotics to reduce the purity level and the difference is this: The cutting agents, the other items mixed into the substance are ingestible to the body and usable and that is what *Stewart* means by marketable, not that the drug was pure, but that's simply for a point of clarification; rather, a comment I have.

Your Honor, you noted both jury instructions. I wanted to make sure I understood correctly. In both of those jury instructions was the jury asked whether there was a mixture or substance containing 50 grams or more of methamphetamine?

THE COURT: A detectable amount.

MR. FEIN: They were both mixture or substance, detectible amount.

THE COURT: Yes.

MR. FEIN: Thank you, Your Honor.

And I just renew my objection for purposes of the record, Your Honor.

THE COURT: All right. All right. Accordingly, having made these decisions, if you come up, please, Miss Clarke, to the podium.

I determine that there is in fact a total offense level of 26, a criminal history category of one.

As to custody, pursuant to the advisory guidelines, the range is 63 to 78 months. The supervised release is two to [53] three years as to Counts 2 and 5. And as to Counts 3 and 4, it is a four to five-year period.

The fine range is $12,500 to four million dollars.

All right. Mr. Fein, I'll be glad to hear from you by way of allocution.

MR. FEIN: Thank you, Your Honor.

In this case it seems to me, Your Honor, that the statutory purposes of sentencing at 3553(a) would best be served by the sentence of a mandatory minimum which is 60 months.

One reason for this is simply the structure of the guidelines that applies in this case. As the Supreme

Court noted in *Kimbrough*, when the guidelines were first constructed, the sentencing commission attempted to create a guideline system based on past practice and empirical data. To that end they reviewed 10,000 presentence investigation reports and sentences imposed in a myriad of cases in an effort to develop in a sense a form of federal sentencing common law.

The sentencing commission, however, departed from that project with respect to two guidelines. Of importance here is the guideline with respect to which they rejected their project, the drug quantity guideline, and instead of relying on past practice and prior sentences imposed in federal districts throughout the country, the commission relied on

* * *

United States District Court
Eastern District of Missouri

UNITED STATES OF AMERICA	AMENDED JUDGMENT IN A CRIMINAL CASE
v.	CASE NUMBER: 4:07CR577 SNL
PAMELA CLARKE	USM Number: 34732-044
	Adam Fein Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on counts(s) two through five of the five count indictment on May 14, 2008 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC 841(c)(2)	Possession of Pseudoephedrine Knowing it Would Be Used to Manufacture Methampehtamine	August 23, 2005	two

21 USC 841(a)(1)	Conspiracy to Manufacture in excess of 50 Grams of Methamphetamine	August 23, 2005	three
21 USC 841(a)(2)	Possession with the Intent to Distribute in Excess of 50 Grams of Methampehtamine	September 7, 2006	four

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) one

☐ Count(s) _____ dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

July 29, 2008
Date of Imposition of Judgment

/s/ Stephen N. Limaugh
Signature of Judge

STEPHEN N. LIMBAUGH
SENIOR UNITED STATES
DISTRICT JUDGE
Name & Title of Judge

July 29, 2008
Date signed

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC 856(a)(2)	Maintaining Drug-Involved Premises	August 23, 2005	five

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of sixty-three months.

This term consists of a term of 63 months on each of counts two through five, all such terms to be served concurrently.

☒ The court makes the following recommendations to the Bureau of Prisons:

While in the custody of the BOP, it is recommended the defendant be evaluated for participation in the Residential Drug Abuse Program if this is consistent with the BOP policies.

It is further recommended, defendant be designated to FPC Greenville, IL.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at _____ a.m./p.m. on _____
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before 2 p.m. on _____
- ☐ as notified by the United States Marshal
- ☐ as notified by the Probation or Pretrial Services Office

MARSHALS RETURN
MADE ON SEPARATE PAGE

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FOUR YEARS. This term consists of a term of two years on each of counts two and five, and four years three and four, all such terms to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable).

☐ The Defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution obligation, it shall be a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment

The defendant shall comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL STANDARD CONDITIONS OF SUPERVISION

WHILE ON SUPERVISED RELEASE, THE DEFENDANT SHALL COMPLY WITH THE STANDARD CONDITIONS THAT HAVE BEEN ADOPTED BY THIS COURT AS WELL AS THE FOLLOWING ADDITIONAL CONDITIONS:

1. The defendant shall refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of commencement of supervision and at least two periodic drug tests thereafter for use of a controlled substance.

2. The defendant shall participate in a drug or alcohol abuse treatment program approved by the United States Probation Office, which may include substance abuse testing, counseling, residence in a Community corrections Center, residence in a Comprehensive Sanctions Center, Residential Re-entry Center, or in-patient treatment in a treatment center or hospital. The defendant shall pay for the costs associated with the substance abuse treatment based on a co-payment fee established by the United States Probation Office. Co-payments shall never exceed the total costs of services provided.

3. The defendant shall abstain from the use of alcohol and/or all other intoxicants.

4. The defendant shall submit her person, residence, office, or vehicle to a search conducted by a United States Probation Office at reasonable times

and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

5. If not obtained while in the custody of the United States Bureau of Prisons, the defendant shall participate in GED classes as approved by the United States Probation Office.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6

	Assessment	Fine	Restitution
Totals:	$400.00	_____	_____

☐ The determination of restitution is deferred until ___. *An Amended Judgment in a Criminal Case* (AO 245C) will be entered after such a determination.

☐ The defendant shall make restitution, payable through the Clerk of Court, to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. 3664(i), all nonfederal

victims must be paid before the United States is paid.

Name of Payee	Total Loss1*	Restitution Ordered	Priority or Percentage
Totals:	_____	_____	_____

☐ Restitution amount ordered pursuant to plea agreement: _____

☐ The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6, may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ The interest requirement is waived for the ☐ fine and/or ☐ restitution.

☐ The interest requirement for the ☐ fine ☐ restitution is modified as follows:

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☒ Lump sum payment of $400.00 due immediately, balance due

☐ not later than _____ , or

☐ in accordance with ☐ C, ☐ D, or ☐ E below; or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ E below; or ☐ F below; or

C ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of _____ over a period of (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of _____ over a period of (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after Release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are made to the clerk of the court.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 08-2778

United States of America,

Appellee

v.

Pamela Clarke,

Appellant

Appeal from U.S. District Court for the Eastern District of Missouri – St. Louis
(4:07-cr-00577-SNL-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Gruender did not participate in the consideration or decision of this matter.

July 16, 2009

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans